No. 98-231

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In The

Supreme Court of the United States

October Term, 1998

GRUPO MEXICANO DE DESARROLLO, S.A., DESARROLLO DE INFRAESTRUCTURA, S.A. DE C.V., OBRAS Y PROYECTOS, S.A. DE C.V., DESARROLLO URBANO INTEGRAL, S.A. DE C.V., and DESARROLLO INDUSTRIAL LATINO-AMERICANO, S.A. DE C.V.,

Petitioners,

-against-

ALLIANCE BOND FUND, INC., ALLIANCE WORLD DOLLAR GOVERNMENT FUND II, INC., ALLIANCE GLOBAL DOLLAR GOVERNMENT FUND, INC., ELLIOT ASSOCIATES, L.P., AVALON TOTAL RETURN FUND, L.P., THE VARDE FUND, L.P., THE VARDE FUND II-A, L.P., THE VARDE FUND II-B, L.P., THE VARDE FUND III-A, L.P., THE VARDE FUND III-B, L.P., and THE VARDE FUND IV-A, L.P.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

In an action for money damages when the defendant does not contest *in personam* jurisdiction or liability, is admittedly insolvent and in the process of dissipating its principal asset in an attempt to frustrate the plaintiff's anticipated judgment, may a United States district court issue a preliminary injunction prohibiting the defendant from further dissipating its principal asset in order to maintain the status quo and protect the plaintiff's damages remedy?

RULE 29.6 STATEMENT

Pursuant to Supreme Court Rule 29.6, Respondents Alliance Bond Fund, Inc., Alliance World Dollar Government Fund II, Inc., and Alliance Global Dollar Government Fund, Inc. (the "Alliance Funds"), certify that each is a Maryland corporation registered as an investment company under the Investment Company Act of 1940, as amended, whose shares are publicly held. Given their nature, we believe that none of the Alliance Funds has any "parent companies and nonwholly owned subsidiaries" within the meaning of Supreme Court Rule 29.6. Alliance Capital Management, L.P. ("Alliance Capital"), the investment advisor to each of the Alliance Funds, is a Delaware limited partnership whose units are traded on the New York Stock Exchange (the "NYSE"). More than 50% of Alliance Capital's units are owned by wholly-owned direct or indirect subsidiaries of The Equitable Life Assurance Society of the United States ("Equitable"). Equitable is a wholly-owned subsidiary of The Equitable Companies, Incorporated, a holding company, shares of which are traded on the NYSE. The Equitable Companies is controlled by AXA-UAP, a holding company for an international group of insurance and related financial services companies. American Depository Receipts with respect to AXA-UAP also are traded on the NYSE. Various French mutual insurance companies control AXA-UAP.

RULE 29.6 STATEMENT – Continued

Pursuant to Rule 29.6 of the Supreme Court Rules, Credit Suisse First Boston Corporation, as Successor-in-Interest to Respondents Elliot Associates, L.P., Avalon Total Return Fund, L.P., The Varde Fund, L.P., The Varde Fund II-A, L.P., The Varde Fund II-B, L.P., The Varde Fund III-A, L.P., The Varde Fund III-B, L.P., and The Varde Fund IV-A, L.P., hereby certifies that Credit Suisse First Boston, Inc. ("CSFB, Inc.") is its corporate parent company. CSFB, Inc.'s voting shares are owned 51% by Credit Suisse First Boston, a bank, which, in turn, is wholly-owned by Credit Suisse Group ("CS Group"), and 49% by CS Group. CSFB, Inc's nonvoting shares are 100% owned by Credit Suisse First Boston, the bank. There are no nonwholly owned subsidiaries of Credit Suisse First Boston Corporation.

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INTRODUCTION

Petitioners, Grupo Mexicano de Desarrollo, S.A., *et al.* ("GMD"), seek review of the Second Circuit's opinion affirming the district court's order preliminarily enjoining GMD from dissipating, disbursing, transferring, conveying, encumbering or otherwise distributing or affecting its rights to its principal asset. *See* App. 1a-21a; 22a-27a.[1] The opinion of the Second Circuit, however, does not warrant this Court's review because (1) this Court has three times before denied certiorari on the same issue and nothing has changed that would warrant a different decision now, (2) there is no genuine conflict among the circuits on the issue, (3) the Second Circuit correctly construed this Court's precedents in affirming the district court's order, and (4) the question presented lacks any broad impact or national importance. Accordingly, GMD's Petition should be denied.

STATEMENT OF THE CASE

GMD is a Mexican holding company that, through its various subsidiaries and joint ventures, is engaged in the construction business. From 1990 to 1994, GMD participated in the Mexican government's program to build a vast intercity toll road network. App. 3a. The program, however, due to economic uncertainty, currency devaluation and other factors, was financially unsuccessful. As a

[1] "App." refers to pages of the Appendix to GMD's Petition for a Writ of Certiorari ("Petition" or "Pet."). No separate appendix accompanies this Brief in Opposition.

result, GMD is owed substantial amounts on unpaid invoices relating to its work in building the toll roads ("Toll Road Receivables"). App. 3a-4a.

In February of 1994, GMD offered and sold to institutional investors $250 million of 8.25% guaranteed notes, due in 2001 ("Bonds"). Respondents, Alliance Bond Fund, Inc., *et al.* ("Respondents"), are eleven institutional investment funds that purchased over $75 million principal amount of the Bonds. App. 3a.

By 1997, GMD was in a precarious financial position. In its Annual Report for the fiscal year ended December 31, 1996, filed with the United States Securities and Exchange Commission on June 30, 1997, GMD admitted that its liabilities exceeded its assets and expressed "substantial doubt" that the company could continue as a going concern. App. 3a-4a. In August 1997, GMD defaulted on the interest payment on the Bonds then due. GMD's insolvency was further confirmed by its October 28, 1997 press release reporting revenues of approximately $119 million, net losses of approximately $802 million through the third quarter of 1997, and a negative net worth of $214 million. App. 4a-5a.

Recognizing the dire financial situation facing the toll road program participants, including GMD, the Mexican government initiated a Toll Road Rescue Program. Under that program, the Mexican government offered to exchange government guaranteed notes ("Government Notes") for the Toll Road Receivables held by companies such as GMD. Although the Government Notes had not been distributed to GMD, in October 1997 GMD publicly

disclosed that it expected to receive $309 million in Government Notes, which were its principal asset. App. 4a. GMD also reported that it had already pledged $117 million in Government Notes to satisfy certain of its Mexican creditors.[2] App. 5a.

As a result of GMD's admitted default, Respondents accelerated the principal on their Bonds and then commenced this action, seeking damages for such default. Due to GMD's pledges of $117 million of the Government Notes, Respondents also sought a temporary restraining order and a preliminary injunction restraining GMD from frustrating any judgment by further pledging or otherwise transferring its interests in the Government Notes. App. 5a. It was not until the hearing on the preliminary injunction was underway that GMD disclosed that it had not been completely candid regarding the amount of Government Notes that it had pledged to its Mexican creditors. It revealed that, instead of $117 million in such pledges, it had in fact pledged between $214 and $258 million to its Mexican creditors. GMD also acknowledged that it planned to make further pledges, leaving only $5.5 million of the original $309 million in Government Notes to satisfy the $75 million plus interest owed to Respondents. App. 5a-6a.

The district court found Respondents' ultimate success on the merits to be almost certain (GMD did not challenge the jurisdiction of the district court over it or its

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[2] GMD accomplished these pledges by either "irrevocably" assigning or placing into "trust" Toll Road Receivables for these creditors with the understanding that the Toll Road Receivables later would be exchanged for Government Notes. App. 5a.

liability on the Bonds)[3] and concluded that, due to GMD's admitted insolvency as well as its attempt to frustrate Respondents' anticipated judgment by assigning the Government Notes exclusively to Mexican creditors, Respondents would be irreparably harmed absent a preliminary injunction. To maintain the status quo and protect Respondents' damages remedy, the district court preliminarily enjoined GMD from dissipating, transferring or otherwise encumbering GMD's right to receive or benefit from the Government Notes. App. 26a.

On appeal, GMD conceded the district court's findings of irreparable injury and likelihood of success on the merits, but challenged its authority to issue the preliminary injunction. Pet. at 4. The Second Circuit unanimously affirmed the district court's order. First, it recognized that Rules 64 and 65 of the Federal Rules of Civil Procedure are not mutually exclusive, as GMD argued below. Thus, the unavailability of relief under

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[3] Respondents have since obtained a Judgment from the district court against GMD in the amount of $82,444,259. App. 58a-59a. This Judgment also converted the preliminary injunction appealed from here into a permanent injunction pending satisfaction of the Judgment. Although GMD has appealed the Judgment to the extent it requires GMD to turn over to Respondents Toll Road Receivables or Government Notes in an amount sufficient to satisfy the Judgment, GMD has not appealed the award of money damages. Moreover, it specifically withdrew its appeal from the portion of the Judgment granting the permanent injunction, effectively conceding the appropriateness of such injunctive relief. The withdrawal of that appeal is inconsistent with GMD's request that this Court review the decision of the Second Circuit affirming the preliminary injunction.

Fed. R. Civ. P. 64 did not preclude the district court, given its personal jurisdiction over GMD, from using its injunctive powers pursuant to Fed. R. Civ. P. 65 to restrain GMD from dissipating its assets regardless of where those assets were located. App. 6a-9a. The Second Circuit then carefully examined the relevant precedents of this Court, the holdings of other courts of appeals and its own decisions to determine whether the district court had authority to issue the preliminary injunction. It concluded that, in the extraordinary situation, as here, when a defendant either is insolvent or is dissipating assets in frustration of a plaintiff's anticipated judgment, Fed. R. Civ. P. 65 authorizes a district court to preliminarily enjoin the defendant to protect the plaintiff's damages remedy. App. 9a-18a. Significantly, with respect to GMD's dissipation of Government Notes in an attempt to frustrate Respondents' judgment, the Court of Appeals stated:

> The plain import of [the district court's] findings is that the actions of GMD were less than benign. . . . This finding was adequately supported. . . . Contrary to [a] legitimate business justification . . . [the district court] clearly believed that GMD was improperly establishing a priority of creditors. . . . GMD's duplicity in disclosing the full extent of its assignments further supports this conclusion.

App. 17a-18a.[4]

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[4] This statement demonstrates the irrelevance of GMD's claim that "[t]here was no suggestion that the assignments in favor of the preferred creditors . . . were on account of anything other than valid debts of GMD." Pet. at 3. As the district court found, and the Second Circuit agreed, GMD, by these transfers,

REASONS THE WRIT SHOULD BE DENIED

As already determined by this Court three times before, the question presented by this appeal does not warrant review. Moreover, the decision of the Second Circuit does not create a genuine conflict with decisions of other circuit courts, and is entirely consistent with the relevant decisions of this Court. Last, the question presented lacks the level of importance necessary to merit review by this Court.

I. THIS COURT HAS THREE TIMES BEFORE DENIED CERTIORARI REVIEW OF THE QUESTION PRESENTED BY THIS APPEAL

On three prior occasions, this Court has considered petitions for review of essentially the same question as that presented by this appeal. In each instance, despite arguments similar to those of GMD, this Court has denied certiorari. *See In re Estate of Ferdinand Marcos*, 25 F.3d 1467 (9th Cir. 1994), *cert. denied*, 513 U.S. 1126 (1995); *Mitsubishi Int'l Corp. v. Cardinal Textile Sales, Inc.*, 14 F.3d 1507 (11th Cir. 1994), *cert. denied*, 513 U.S. 1146 (1995); *Ebsco Indus., Inc. v. Lilly*, 840 F.2d 333 (6th Cir.), *cert. denied*, 488 U.S. 825 (1988).[5] Nothing has changed with respect to this question to warrant a different result here.

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was not attempting legitimately to reduce debt and pay off creditors, but to frustrate an anticipated, uncontested judgment in Respondents' favor. App. 17a, 25a-26a.

[5] In *Marcos*, the question presented by petitioner was: "Whether a district court may issue a preliminary injunction freezing the assets of a defendant in a case in which no equitable claim is asserted and no final equitable relief is sought." In *Mitsubishi*, the question presented by petitioner was: "Whether

II. THE DECISIONS OF THE CIRCUIT COURTS OF APPEALS ARE NOT IN CONFLICT

GMD claims that decisions of the Fifth, Tenth and Eleventh Circuits[6] conflict with those of the First, Third, Sixth and Ninth Circuits,[7] which the Second Circuit followed. Pet. at 5. The decisions of the Fifth, Tenth and Eleventh Circuits relied on by GMD, however, are readily distinguishable on key facts from the decisions of the First, Third, Sixth and Ninth Circuits. Moreover, other decisions of the Fifth and Tenth Circuits are consistent with the decisions of the First, Third, Sixth and Ninth Circuits. Therefore, no genuine conflict exists.

In the Fifth and Eleventh Circuit cases relied on by GMD, there is no evidence, unlike here, that the defendants were insolvent, that any judgment would be

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federal district courts have the authority under Rule 65 of the Federal Rules of Civil Procedure and the All Writs Act, 28 U.S.C. § 1651, to issue preliminary injunctions freezing defendants' assets in order to protect a future money judgment." In *Ebsco*, the question presented by petitioner was: "Whether a federal district court may issue a preliminary injunction, prohibiting a defendant from spending his assets, in order to preserve a pool of funds for the payment of a potential future money judgment."

[6] *See Rosen v. Cascade Int'l, Inc.*, 21 F.3d 1520 (11th Cir. 1994); *Mitsubishi Int'l Corp. v. Cardinal Textile Sales, Inc.*, 14 F.3d 1507 (11th Cir. 1994); *Home-Stake Prod. Co. v. Talon Petroleum, C.A.*, 907 F.2d 1012 (10th Cir. 1990); *In re Fredeman Litig.*, 843 F.2d 821 (5th Cir. 1988).

[7] *See In re Estate of Ferdinand Marcos*, 25 F.3d 1467 (9th Cir. 1994); *Hoxworth v. Blinder, Robinson & Co.*, 903 F.2d 186 (3d Cir. 1990); *Ebsco Indus., Inc. v. Lilly*, 840 F.2d 333 (6th Cir. 1988); *Teradyne, Inc. v. Mostek Corp.*, 797 F.2d 43 (1st Cir. 1986).

rendered uncollectible as a result of the defendants' transfers of assets or that the damages remedy otherwise would be inadequate. Indeed, the Fifth and Eleventh Circuits explicitly recognized the absence of such circumstances. *See Rosen*, 21 F.3d at 1527 n.14 ("there is no indication in this case that a legal remedy would not be sufficient"); *Mitsubishi*, 14 F.3d at 1520 (same); *Fredeman*, 843 F.2d at 826 (the only allegation in the record concerning inability to pay money damages was that the defendants were "scoundrels who will try to escape judgment," which, even if true, would not justify a preliminary injunction). Moreover, in *Fredeman*, the Fifth Circuit expressly distinguished cases upholding preliminary injunctions designed, as here, to protect the status quo when a defendant is or is about to become insolvent. *See* 843 F.2d at 828 (citing *Deckert v. Independence Shares Corp.*, 311 U.S. 282 (1940)).

The Tenth Circuit's decision in *Home-Stake Production Co. v. Talon Petroleum, C.A.*, 907 F.2d 1012 (10th Cir. 1990), also is distinguishable; there, the court dismissed the action against the defendants whose assets were sought to be enjoined for lack of personal jurisdiction, not because the court lacked power to issue such an injunction. *See id.* at 1020-21.

Not only are the decisions relied upon by GMD distinguishable, other decisions of the Fifth and Tenth Circuits are consistent with the decisions of the First, Second, Third, Sixth and Ninth Circuits. In *Federal Savings & Loan Insurance Corp. v. Dixon*, 835 F.2d 554 (5th Cir. 1987), the court stated: "We are unwilling to say that *no* circumstances could support an injunction to secure a legal remedy. . . . This court has held, 'The absence of an

available remedy by which the movant can later recover monetary damages, . . . may also be sufficient to show irreparable injury.' " *Id.* at 560 n.1 (emphasis in original) (citations omitted). The Fifth Circuit cited *Dixon* with approval in *Fredeman*. *See* 843 F.2d at 825.

The Tenth Circuit agrees. *See Tri-State Generation and Transmission Ass'n, Inc. v. Shoshone River Power, Inc.*, 805 F.2d 351, 355 (10th Cir. 1986) (recognizing that difficulty in collecting a damage judgment could support a claim of irreparable injury sufficient to justify a preliminary injunction).[8]

For these reasons, GMD's "well-defined" split among the circuit courts is illusory.

III. THE SECOND CIRCUIT CORRECTLY CONSTRUED THIS COURT'S PRECEDENTS IN AFFIRMING THE DISTRICT COURT'S ORDER

The Second Circuit correctly construed *United States v. First National City Bank*, 379 U.S. 378 (1965), *De Beers Consolidated Mines, Ltd. v. United States*, 325 U.S. 212 (1945), and *Deckert v. Independence Shares Corp.*, 311 U.S.

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[8] In addition, although not mentioned by GMD, several decisions of other circuits, as well as an earlier decision of the Second Circuit, support the issuance of a preliminary injunction when a defendant is facing insolvency or dissipating its assets in an attempt to avoid a judgment. *See United States ex rel. Taxpayers Against Fraud v. Singer Co.*, 889 F.2d 1327 (4th Cir. 1989); *Airlines Reporting Corp. v. Barry*, 825 F.2d 1220 (8th Cir. 1987); *Feit & Drexler, Inc. v. Drexler*, 760 F.2d 406 (2d Cir. 1985); *Roland Mach. Co. v. Dresser Indus., Inc.*, 749 F.2d 380 (7th Cir. 1984).

282 (1940), in affirming the district court's order. First, it interpreted *De Beers* as inapplicable to cases in which a party seeks money damages. App. 9a-11a. It held that "[l]imiting *De Beers* to cases where final equitable relief is all that is sought comports with" *Deckert* and *First National*, which "endorse a district court's exercise of general equitable power to ensure the preservation of an adequate remedy" in an action seeking money damages. App. 11a-13a.

De Beers was a government antitrust action in which the only final relief available was a permanent injunction. Unlike here, the defendants did not owe any debt to the plaintiff, and the district court lacked authority to enter a money judgment. Nevertheless, the government sought a preliminary injunction restraining the corporate defendants from transferring assets as security in the event of a fine for contempt for failure to comply with the permanent injunction enjoining future violations of federal law. *See* 325 U.S. at 214-15, 219. The Court held that such preliminary injunctive relief was unavailable because no money damages ultimately were at issue in the suit, and distinguished *De Beers* from cases in which a preliminary injunction prevents the transfer of a fund or property that could be the subject of a final decree. *See id.* at 219-20 (citing *Deckert*).

Such a fund or property existed in *Deckert* and in *First National*. In *Deckert*, an action for damages under the federal securities laws, the Court recognized that preliminary injunctive relief is available to protect a money judgment upon a showing that the defendant is "insolvent and its assets in danger of dissipation or depletion." 311 U.S. at

290. The Court held that such an injunction was a reasonable measure to preserve the status quo pending final determination of the suit when the legal remedy would be inadequate without recourse to those assets. *See id.*

In *First National*, an action by the government for unpaid taxes, the Court again recognized that preliminary injunctive relief is available to protect a money judgment and to preserve the status quo when there is evidence of dissipation of assets.[9] *See id.* at 379, 385 (citing *Deckert*). In so holding, the Court distinguished *De Beers*: "Unlike [*De Beers*], there is here property which would be 'the subject of the provisions of any final decree in the cause.' " *Id.* at 385 (quoting *De Beers*, 325 U.S. at 220).

As in *Deckert* and *First National*, the ultimate relief that Respondents seek here involves the very same assets (Toll Road Receivables or Government Notes) that are the subject of the preliminary injunction. *See First National*, 379 U.S. at 385; *Hoxworth*, 903 F.2d at 195-96 (Becker, J.) (recognizing that legally, as well as economically, money is fungible and, therefore, when a party seeks money damages, a

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[9] Although the government sued to foreclose on a tax lien, the ultimate relief sought was recovery of the funds held by the defendant bank to satisfy the taxes allegedly owed. For this reason, GMD is mistaken when it claims that *First National* is a case in which the government did not sue for money damages. Pet. at 7. GMD also attempts to distinguish *First National* on the ground that the injunction was issued pursuant to the Internal Revenue Code, not Fed. R. Civ. P. 65. Pet. at 7 n.7. GMD is again mistaken because, as the Second Circuit correctly recognized (App. 11a-12a), although such authority existed, the Court relied on the much broader power of personal jurisdiction in upholding the injunction. *See* 379 U.S. at 380, 384 ("Once personal jurisdiction of a party is obtained, the District Court has authority to order it to 'freeze' property under its control").

preliminary injunction which enjoins money or its equivalent necessarily involves a fund or property that could be the subject of the final decree in the action). The Second Circuit, therefore, correctly interpreted the decisions of this Court in affirming the district court's order.

IV. THE COURT OF APPEALS' DECISION LACKS THE BROAD AND RECURRING IMPACT NECESSARY TO WARRANT REVIEW BY THIS COURT

The impact of the Second Circuit's decision is quite limited. Before the type of relief granted in this case can be ordered, the party seeking the preliminary injunction must satisfy the usual Fed. R. Civ. P. 65 requirements: a showing of likely success on the merits and irreparable harm if the injunction is not issued, *i.e.*, harm that cannot be recompensed by money damages. *See* App. 16a. When a money judgment is sought, only extraordinary circumstances will justify a finding of irreparable harm. Courts that have considered the issue have concluded that either a party's pending insolvency or its dissipation of assets in frustration of a money judgment are sufficient to satisfy the irreparable harm requirement. The reservation of this injunctive remedy to such circumstances belies GMD's contention (Pet. at 8) that there will be widespread encroachment by the district courts on the states' powers to determine when and how provisional remedies should be applied. *See* App. 15a; *Marcos*, 25 F.3d at 1480 (restricting such injunctive relief to only extraordinary circumstances where there is insolvency or dissipation of assets avoids the concern expressed in *De Beers* of a "sweeping effect").

Moreover, in this case, provisional state law remedies are not available under Fed. R. Civ. P. 64. The lack of such

relief under Fed. R. Civ. P. 64 further justifies the district court's use of its equitable powers under Fed. R. Civ. P. 65 because, in the absence of injunctive relief, Respondents would be deprived of any remedy. *See* App. 8a (recognizing that a district court is not rendered powerless merely because property lies outside the boundaries of New York State, if it has personal jurisdiction over the defendant, citing among other cases *First National*, 379 U.S. at 384). *See also De Beers*, 325 U.S. at 218 (recognizing that the government disclaimed any reliance on Fed. R. Civ. P. 64, yet not even hinting that this disclaimer could be an appropriate reason to deny a preliminary injunction); *Deckert*, 311 U.S. at 288 (recognizing that the power to make the right of recovery effective implies the power to utilize any of the procedures available according to the exigencies of the particular case). Last, although the preliminary injunction here prevents GMD from dissipating the Government Notes, its purpose is to maintain the status quo and not to seize property to secure satisfaction of Respondents' judgment. Thus, the preliminary injunction is neither a prejudgment attachment nor an end run around Fed. R. Civ. P. 64, as GMD claims. Pet. at 8.

GMD's argument that the decision of the Second Circuit impermissibly expands creditors' rights (Pet. at 8-9) is equally flawed. The preliminary injunction neither grants Respondents any lien on, interest in, or control over any of GMD's assets, nor does it decide any issue of priority among GMD's creditors in Mexico or elsewhere. Moreover, because GMD has not declared bankruptcy or sought any of the protections afforded by a declaration of bankruptcy, the "creditors' rights" touted by GMD simply do not exist – and may never exist. Outside of a bankruptcy proceeding, there is no rule requiring an

equitable proportioning of a given defendant's assets among its creditors. Accordingly, GMD is just like any other defendant which has not declared bankruptcy – subject to the district court's inherent power to effectuate its judgment against a defendant over which it has personal jurisdiction. In any event, this argument was neither briefed by GMD below nor addressed by the Second Circuit. Therefore, it is not properly before this Court and should be disregarded. *See Posters 'n' Things, Ltd. v. United States*, 511 U.S. 513, 527 (1994).

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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